ORAL ARGUMENT NOT YET SCHEDULED

No. 18-1151
(Consolidated with 18-1180)

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

MURRAY AMERICAN ENERGY, INC., ET AL.,
Petitioners

v.

NATIONAL LABOR RELATIONS BOARD,
Respondent

On Petition for Review from a Decision of
The National Labor Relations Board

BRIEF OF PETITIONERS

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CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

Under Circuit Rule 28(a)(1), Petitioners Murray American Energy, Inc., The Harrison County Coal Company, The Marion County Coal Company, The Monongalia County Coal Company, and The Marshall County Coal Company certify:

(A) Parties and Amici. In the agency proceedings below, NLRB Case Nos. 06-CA-169736, 06-CA-170978, 06-CA-171057, 06-CA-171069, 06-CA-171085, 06-CA-174075, 06-CA-174080, 06-CA-174152, 06-CA-183054, 06-CA-185640, and 06-CA-186015, these parties appeared:

- General Counsel, National Labor Relations Board
- Murray American Energy, Inc.
- The Harrison County Coal Company
- The Marion County Coal Company
- The Monongalia County Coal Company
- The Marshall County Coal Company
- United Mine Workers of America
- United Mine Workers of America, AFL-CIO
- United Mine Workers of America, District 31, AFL-CIO, CLC
- United Mine Workers of America, District 31, Local 1501, AFL-CIO

- United Mine Workers of America, District 31, Local 9909, AFL-CIO, CLC

In the proceedings before this Court, the parties include Murray American Energy, Inc., The Harrison County Coal Company, The Marion County Coal Company, The Monongalia County Coal Company, The Marshall County Coal Company, and the National Labor Relations Board. The United Mine Workers of America International Union is an intervenor in this matter.

(B) Rulings Under Review. The ruling under review is the decision of the National Labor Relations Board in *Murray American Energy, Inc. and the Harrison County Coal Company, a single employer, and United Mine Workers of America District 31, Local 1501, AFL-CIO, CLC, Murray American Energy, Inc. and the Marion County Coal Company, a single employer, and United Mine Workers of America, District 31, Local 9909, AFL-CIO, CLC, Murray American Energy, Inc. and the Monongalia County Coal Company, a single employer, and United Mine Workers of America, AFL-CIO, CLC, and Murray American Energy, Inc. and the Marshall County Coal Company, a single employer, and United Mine Workers of America, District 31, AFL-CIO, CLC*, 366 NLRB No. 80, which was entered on May 7, 2018 and which affirmed the rulings, findings, and conclusions and adopted the recommended Order as modified of Administrative Law Judge David I. Goldman, issued on May 8, 2017.

(C) Related Cases. This case has not been before this court or any other court. This case is related to D.C. Cir. Case No. 18-1180 (cross-appeal of National Labor Relations Board for enforcement), with which it is consolidated. Counsel is not aware of any other related cases pending in this court or any other court within the meaning of Circuit Rule 28(a)(1).

CORPORATE DISCLOSURE STATEMENT

Pursuant to Fed. R. App. P. 26.1 and Circuit Rule 26.1, Petitioners Murray American Energy, Inc., The Harrison County Coal Company, The Marion County Coal Company, The Monongalia County Coal Company, and The Marshall County Coal Company, make the following disclosure:

1. The Harrison County Coal Company, The Marion County Coal Company, The Monongalia County Coal Company, and The Marshall County Coal Company are operators of four underground coal mines in West Virginia. These companies are all wholly-owned subsidiaries of Murray American Energy, Inc.

2. Murray American Energy, Inc. is a wholly-owned subsidiary of Ohio Valley Resources, Inc.

3. Ohio Valley Resources, Inc. is a wholly-owned subsidiary of Murray Energy Corporation.

4. Murray Energy Corporation is a wholly-owned subsidiary of Murray Energy Holding Company, its parent company.

5. Murray Energy Corporation holds a 10% or greater ownership interest in Foresight Energy LP, which is a publicly-held company.

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GLOSSARY

"Petitioners" refers collectively to Murray American Energy, Inc., The Harrison County Coal Company, The Monongalia County Coal Company, The Marshall County Coal Company, and The Marion County Coal Company.[1]

"Harrison County Mine" means The Harrison County Coal Company.

"Mon County Mine" means The Monongalia County Coal Company.

"Marshall County Mine" means The Marshall County Coal Company.

"Marion County Mine" means The Marion County Coal Company.

"Ohio Valley Resources" means Ohio Valley Resources, Inc.

"ALJ" means administrative law judge.

"Judge Goldman" means Administrative Law Judge David I. Goldman.

"Decision and Order" or the "Decision" means the National Labor Relations Board's May 7, 2018 Decision and Order in *Murray American Energy, Inc. and the Harrison County Coal Company, a single employer, and United Mine Workers of America, District 31, Local 1501, AFL-CIO, CLC, Murray American Energy, Inc. and the Marion County Coal Company, a single employer, and United Mine Workers of America, District 31, Local 9909, AFL-CIO, CLC, Murray American Energy, Inc. and the Monongalia County Coal Company, a single employer, and United Mine Workers of America, AFL-CIO, CLC, and Murray American Energy, Inc. and the Marshall County Coal Company, a single employer, and United Mine Workers of America, District 31, AFL-CIO, CLC*, Case Nos. 06-CA-169736, 06-CA-170978, 06-CA-171057, 06-CA-171069, 06-CA-171085, 06-CA-174075, 06-CA-174080,

[1] Although the various unfair labor practice charges at issue were filed against the entity for which the respective charging party worked, throughout this brief, these entities will be referred to collectively as "Petitioners." When relevant, however, specific reference will be made to the appropriate employing entity.

06-CA-174152, 06-CA-183054, 06-CA-185640 and 06-CA-186015, reported at 366 NLRB No. 80.

"NLRA" or the "Act" means the National Labor Relations Act, 29 U.S.C. §§ 151, *et seq.*

"NLRB" or the "Board" means National Labor Relations Board.

"General Counsel" means Counsel for the NLRB.

The "Union" refers collectively to the United Mine Workers of America International Union, its District 31, and its Locals 1501 and 9909.

"2011 NBCWA" means the National Bituminous Coal Wage Agreement of 2011.

"2016 NBCWA" means the National Bituminous Coal Wage Agreement of 2016.

"MSHA" means the Mine Safety and Health Administration.

JURISDICTIONAL STATEMENT

Under Section 10(e) of the Act, as amended, 29 U.S.C. §§ 151, *et. seq.*, the Board had subject matter jurisdiction to issue the Decision and Order, published at 366 NLRB No. 80 (2018) and dated May 7, 2018, which is a final order and the subject of the Petition for Review and Cross-Application for Enforcement now before this Court. Petitioners promptly filed the Petition for Review on May 31, 2018.

The Court has appellate jurisdiction under Section 10(e) of the Act, and venue in this Court is proper under Section 10(f) of the Act. *See* 29 U.S.C. §§ 160(e)-(f).

STATEMENT OF THE ISSUES

1. Whether the Board erred in affirming Judge Goldman's findings and determination that Joshua Peek was threatened with reprisal for filing a grievance in violation of Section 8(a)(1)?

2. Whether the Board erred in affirming Judge Goldman's findings and determination that David Jones directed employees not to file complaints with MSHA in violation of Section 8(a)(1)?

3. Whether the Board erred in affirming Judge Goldman's application of the factors in *Atlantic Steel Co.*, 245 NLRB 814 (1979) to determine Jamie Hayes' conduct did not rise to the level necessary to lose the protection of the Act?

4. Whether the Board erred in affirming Judge Goldman's findings and determination that Jeremy Devine unlawfully conducted surveillance of employees where Devine was properly in the MSHA offices to attend a meeting?

5. Whether the Board erred in affirming Judge Goldman's findings and determination that Ben Phillips' statement contained a direct threat of discipline in retaliation for Joshua Preston's request for union representation and would have been reasonably understood as such?

6. Whether the Board erred in affirming Judge Goldman's application of the factors in *Wright Line, Inc.*, 251 NLRB 1083 (1980) to determine the discipline

of Mark Moore was unlawfully motivated by his protected and concerted union activity and by his filing of an unfair labor practice charge?

7. Whether the Board erred in affirming Judge Goldman's findings and determinations that Petitioners violated Sections 8(a)(1) and 8(a)(5) of the Act in responding to the Union's information requests?

8. Whether the Board erred in affirming Judge Goldman's findings and determination that Petitioners' decision to hold step three grievances at the Metz Portal was a material rather than a *de minimis* unilateral change on a mandatory subject of bargaining and violated Section 8(a)(5) of the Act?

STATUTES AND REGULATIONS

29 U.S.C. § 158(a)(1):

> It shall be an unfair labor practice for an employer . . . to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7 [section 157 of this title] . . .

29 U.S.C. § 158(a)(3):

> It shall be an unfair labor practice for an employer . . . by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization . . .

29 U.S.C. § 158(a)(4):

> It shall be an unfair labor practice for an employer . . . to discharge or otherwise discriminate against an employee because he has filed charges or given testimony under this subchapter;

29 U.S.C. § 158(5):

> It shall be an unfair labor practice for an employer . . . to refuse to bargain collectively with the representatives of his employees . . .

29 U.S.C. § 160(e):

> The Board shall have power to petition any court of appeals of the United States . . . wherein the unfair labor practice in question occurred or wherein such person resides or transacts business, for the enforcement of such order and for appropriate temporary relief or restraining order, and shall file in the court the record in the proceeding, as provided in section 2112 of title 28. Upon the filing of such petition, the court shall . . . have power to grant such temporary relief or restraining order as it deems just and proper, and to make and enter a decree enforcing, modifying and enforcing as so modified, or setting aside in whole or in part the order of the Board. . . .The findings of the Board with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall be conclusive. . .

29 U.S.C. § 160(f):

> Any person aggrieved by a final order of the Board granting or denying in whole or in part the relief sought may obtain a review of such order in any United States court of appeals in the circuit wherein the unfair labor practice in question was alleged to have been engaged in or wherein such person resides or transacts business, or in the United States Court of Appeals for the District of Columbia, by filing in such court a written petition praying that the order of the Board be modified or set aside . . . . Upon the filing of such petition, the court shall proceed in the same manner as in the case of an application by the Board under subsection (e), and shall have the same jurisdiction to grant to the Board such temporary relief or restraining order as it deems just and proper, and in like manner to make and enter a decree enforcing, modifying, and enforcing as so modified, or setting aside in whole or in part the order of the Board. The findings of the Board with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall . . . be conclusive.

STATEMENT OF THE CASE

I. Factual Background

This matter concerns five separate entities in the coal industry: Murray American Energy, Inc., the Harrison County Mine, the Mon County Mine, the Marshall County Mine, and the Marion County Mine.[2] Murray American Energy, Inc. is a wholly-owned subsidiary of Ohio Valley Resources, which is a wholly-owned subsidiary of Murray American Energy Corporation. APP0666. The Harrison County Mine, Mon County Mine, Marshall County Mine, and Marion County Mine are underground coal mines in West Virginia and each is a wholly-owned subsidiary of Murray American Energy, Inc. APP0666. The mines were owned by Consol Energy, Inc., but ownership was transferred to Ohio Valley Resources on or about December 5, 2013. APP0666.

Each mine has its own management structure, but operations are generally overseen by either a superintendent or general manager, or both. APP0382-APP0383. Each mine has its own small human resources staff, and there are also "corporate" human resources employees responsible for providing support to all of the mines. APP0381-APP0382. During the relevant time period, the Harrison County Mine employed approximately 275 employees; the Mon County Mine

[2] Each mine has stipulated that it and Murray American Energy, Inc. are a single employer; the mines have not, however, stipulated that they are collectively a single employer.

employed approximately 230 employees; and the Marshall County Mine and Marion County Mine employed 545 and 356 employees, respectively. APP0383.

The Union, through various locals (1638, 9909, 1501, and 1702) represents the hourly production and maintenance employees at each mine. APP0666-APP0667. All represented employees were subject to the 2011 NBCWA and are currently subject to the 2016 NBCWA. APP0667.

It is no secret that "[t]he coal industry has been in demise for approximately ten years[.]" APP0380. Challenges notwithstanding, Murray Energy Corporation currently stands as the largest underground coal mining company in America, and one of the last remaining successful coal industry companies.

A. *General Background Regarding the Unfair Labor Practice Charges*

This case originated with the filing of eleven unfair labor practice charges against the Petitioners. A Consolidated Complaint was issued and amended multiple times. The operative complaint issued on December 29, 2016 under the Third Order Further Consolidating Cases ("Complaint"). It was amended by an order dated January 9, 2017, and later by motion at the ALJ hearing. Therein, the Union alleged that Petitioners engaged in a variety of discrete acts that violated Sections 8(a)(1), 8(a)(3), 8(a)(4), and 8(a)(5) of the Act. The relevant factual background about each of the alleged violations at issue here is below.

1. The Alleged Section 8(a)(1) Violations

The Alleged Threat of Reprisal Made to Joshua Peek. The Union's allegation that Petitioners threatened employees with unspecified reprisals if they filed grievances, as set forth in paragraphs 13(a) and 37 of the Complaint, arose out of an interaction between Joshua Peek, a shear operator at the Harrison County Mine, and Scott Martin, the mine's superintendent. APP0368-APP0369; APP0373. Specifically, the two discussed a grievance Peek filed in connection with what Peek believed to be a longwall coordinator's performance of union work. APP0370-APP0371. Peek claimed that Martin approached him and asked him why he filed the grievance. APP0373. After Peek offered his explanation, he claimed that Martin asked him to withdraw the grievance and told him he was "not one of those people to file grievances." APP0374. Peek further claimed Martin stated he had "helped [Peek] out in the past" and would "take into consideration when people file grievances when they need help." APP0373. Peek did not report this conversation with Martin to the Union or ask the Union to file a charge regarding it. APP0375. At the hearing, Martin admitted he asked Peek questions about the grievance, but denied asking Peek to withdraw the grievance or threatening him. APP0400; APP0402.

Judge Goldman credited Peek's version of the conversation and, on that basis, determined Martin's statements constituted an unlawful threat of reprisals in violation of Section 8(a)(1) of the Act. The Board affirmed.

The Alleged Directive Not to Submit Complaints to MSHA. This allegation stemmed from a December 2015 safety meeting at the Marion County Mine. APP0011; APP0015. Safety meetings were generally held before the start of each shift in the lamp room. APP0303. Don Jones, the shift foreman, led the meeting. APP0304. Dave Chapman, the assistant shift foreman, Chris England, assistant superintendent, various miners, and Derek Bragg, an MSHA inspector, were also present. APP0304. The discussion at the meeting centered on a "D order" the company had recently received. APP0304. A "D order" is issued under Section 104(d) of the Federal Mine Safety and Health Act of 1977 if there is a violation of a mandatory health or safety standard. *See Office of Assessments Citation and Order Explanations*, https://arlweb.msha.gov/PROGRAMS/assess/citationsandorders.asp.

Jamie Hayes, a former Marion County Mine employee, claimed that Jones—in the presence of an MSHA inspector—directed employees not to bring safety complaints to MSHA. APP0305. Pete Ward, who was assistant to the superintendent at the time of the safety meeting, testified that while Jones encouraged employees to report safety concerns to the company so the company could know of and address them, Jones did not tell employees not to file complaints

with MSHA. APP0473. Ward also denied that Jones told employees they must bring concerns to the company before raising them with MSHA, or that he threatened employees with discipline should they raise concerns with MSHA. APP0473-APP0474. Christopher Simpson, then a project engineer, corroborated Ward's description of the safety meeting. Simpson was standing in a hallway attached to the lamp room, but could see and hear the meeting. APP0468. Like Ward, Simpson testified that Jones encouraged employees to let him know of any safety issues so he could help address them and denied hearing Jones instruct employees to report such issues to him or instruct them not to make safety complaints to MSHA. APP0468. Simpson also denied that Jones told employees they would be disciplined for making safety complaints to MSHA. APP0468.

Despite the implausibility of Hayes' account, and Ward's and Simpson's testimony to the contrary, Judge Goldman credited Hayes and found that Jones issued a directive to bring safety matters to the company instead of to MSHA in violation of Section 8(a)(1) of the Act.

The Alleged Threat of Discipline Made to Jamie Hayes. The Union's allegation that employees were impliedly threatened with discharge because of their Union activities appears to be based upon an interaction between Jones and Hayes. APP0011; APP0015. During the December 2015 safety meeting, Hayes became agitated, stood up, and began loudly complaining about safety issues he believed he

had previously brought to the company, but were not addressed. APP0305; APP0306; APP0469; APP0474. Notably, all witnesses agreed that Hayes' behavior caused Chapman to intervene. APP0306; APP0469; APP0474. Hayes admitted that he then abruptly stormed out of the meeting. APP0306; APP0469; APP0474.

The following day, Chapman told Hayes to go to Jones' office to meet with Jones and England. APP0306. When Hayes arrived, England said he wanted to talk with Hayes about the previous day's safety meeting. APP0307. England told Hayes he was loud and belligerent during the meeting and that if it happened again, Hayes would be disciplined. APP0308. Hayes claimed that England and Jones continued to repeat the message from the previous day's meeting—*i.e.*, Hayes didn't need to go to the authorities and could come to the company about safety issues. APP0308. Hayes was not disciplined during this meeting or at any other point for his conduct during the December 2015 safety meeting. APP0317. Hayes filed a safety complaint with MSHA in early 2016. APP0309.

Judge Goldman found, and the Board affirmed, that England's comment regarding future loud and belligerent conduct was an explicit threat of discipline for voicing safety complaints in violation of Section 8(a)(1) of the Act and, while Hayes was "out of line," he did not lose the Act's protection.

The Alleged Unlawful Surveillance of Jamie Hayes. The alleged unlawful surveillance, as set forth in paragraphs 15(c) and 37 of the Complaint, involved

Marion County Mine's Safety Director Jeremy Devine's exit route from MSHA's district office in Morgantown, West Virginia. APP0011; APP0015. At the request of MSHA, Devine attended an informal safety and health conference at its district office on February 17, 2016. APP0495. Devine's conference began at 9:00 a.m. APP0496. Coincidentally, Hayes was also present at MSHA's district office on the morning of February 17, 2016 for a meeting regarding a complaint he had recently filed with MSHA. APP0309. To access the room in which his conference was held, Devine had to approach and pass by the conference room in which Hayes' meeting was taking place. APP0500. Devine denied that he looked in the window of the conference room to see who was inside, and testified that he had no intention to spy on Hayes while at the MSHA district office. APP0501, APP0503. While the Union's witnesses testified that Devine did more than simply approach and pass by the conference room, their testimonies were implausible and wildly inconsistent.

Notwithstanding the undisputed fact that Devine was properly at the MSHA offices on February 17, 2016, his denial he intentionally observed Hayes while there, and the inconsistent and improbable testimonies of the Union's witnesses, Judge Goldman determined that Devine engaged in unlawful surveillance, and the Board affirmed.

The Alleged Threat of Discipline Made to Joshua Preston. The Union's allegation that Petitioners threatened employees with written discipline if they

requested union representation, as set forth in paragraphs 16(b) and 37 of the Complaint, involved Joshua Preston, a roof bolter at the Marshall County Mine. APP0015; APP0035. Preston worked the day shift on September 13, 2016. APP0325; APP0326. During this shift, Preston was assigned to take the track bolter up to a certain entry in the mine. APP0327. Before he did so, however, John Kirk, the assistant shift foreman he had been assigned to work with for the day, told Preston they were supposed to relieve the workers from the midnight shift. APP0327; APP0330. After his shift ended, Preston met with Ben Phillips, assistant general mine foreman, in Phillips' office. APP0332. Kirk was also present in Phillips' office. APP0425; APP0429. Preston claimed he was directed to report to Phillips' office. Phillips and Kirk both denied this claim and believed Preston stopped by to discuss a personal matter, which was not an uncommon occurrence. APP0425-APP0426; APP0430; APP0431; APP0435. Regardless, the parties agreed that a conversation between Phillips, Kirk, and Preston took place in Phillips' office. They disagreed, however, regarding certain aspects of this conversation.

According to Preston, he immediately and without prompting told Phillips he did not want to come into the office without representation. APP0332. Preston admitted that Phillips told him there was no "write up" at issue and he just had a few questions. *Id.* Preston then claimed that Phillips launched into a tirade related to union representation and stated that he never intended to write Preston up, but if

Preston wanted written up, Phillips could find something to write him up about and Preston could come back the following day with union representation. APP0332-APP0333. Preston testified that Phillips then issued "direct orders" in the form of questions about why Preston did not take a diesel motor for the shift in accordance with his assignment sheet. APP0333. Preston conceded he did not answer Phillips until the third time Phillips asked him the question, and that Kirk answered questions from Phillips. APP0333-APP0334.

Phillips and Kirk denied hearing Preston ask for union representation and denied making any comments related thereto, including the alleged threat to find something to write Preston up about. APP0432; APP0433; APP0427; APP0428. Rather, Phillips and Kirk described the conversation as a typical back-and-forth in which Phillips tried to get information from Preston to plan for the next shift. APP0433; APP0427. Ultimately, the parties agreed that after Phillips had the information he needed, the conversation ended, and Preston was not issued discipline during this conversation, or afterward. APP0334-APP0335; APP0339; APP0427; APP0432-APP0433.

The Board affirmed Judge Goldman's credibility determinations and resultant findings that Phillips made the alleged comment and it was "a smart-aleck but

unmistakable threat to issue written discipline to retaliate against Preston if he asked for union representation."[3] APP0116.

2. The Alleged Section 8(a)(3) and 8(a)(4) Violations

The alleged Section 8(a)(3) and 8(a)(4) violations stemmed from the one-day suspension of Mark Moore, a continuous miner operator at the Marshall County Mine. APP0011; APP0015. Moore was suspended on September 19, 2016 because he was not dressed and ready to go underground for his shift. APP0251. Moore was previously suspended in June 2016 following a tense conversation with assistant superintendent Jeffrey Crowe about a mine shutdown.[4] In or about August 2016, Moore filed a charge regarding his June suspension. APP0251. As for the September 2016 suspension, Moore acknowledged that shift start times were dictated by the collective bargaining agreement and that his scheduled start time was 4:00 p.m. APP0259; APP0253. Eric Koontz, the General Superintendent at the Marshall County Mine, testified that employees were expected to be dressed and ready for work by their starting time—4:00 p.m. APP0438. On September 19, 2016, Moore

[3] The Board noted, however, that Member Emmanuel would not find that Phillips' comment to Preston was unlawful as such a "smart-aleck" remark would be taken by a reasonable employee as just that rather than as a coercive threat to retaliate against Preston if he asked for union representation.

[4] Moore's interaction with Crowe and his June 2016 suspension were also the subjects of unfair labor charges which were ruled upon by Judge Goldman in his May 8, 2017 Decision and Order. Murray did not except to Judge Goldman's findings and conclusions concerning this interaction.

clocked in at 3:56 p.m. and stopped at the bath house, the warehouse, and a water van. APP0253; APP0254. Koontz saw that Moore was clocking in only minutes before 4:00 p.m. and that he would not be dressed and ready for his shift. APP0441. Pictures from the mine's security cameras confirmed that Moore was still dressing and collecting equipment and water after 4:00 p.m. APP0727. Koontz directed Shift Supervisor John Brone to send Moore home because he was late. APP0442. Koontz was not involved in the June suspension of Moore or the unlawful labor practice charge that resulted therefrom. APP0452-APP0453.

Although Petitioners presented evidence that Moore was late on September 19, 2016, the Board affirmed Judge Goldman's finding that Moore's suspension violated Sections 8(a)(3) and 8(a)(4) of the Act because it was unlawfully motivated by his protected and concerted union activity and by the filing of his unfair labor practice charge over the earlier suspension.

3. The Alleged Section 8(a)(5) Violations

Information Requests Concerning Contract Work. The Union asserted that Petitioners violated Section 8(a)(5) of the Act by failing to respond to various information requests. APP0013-APP0015. Karen Mohan, a Human Resources Supervisor at the Mon County Mine, received information requests from the Union related to the mine. APP0506. Mohan received information requests from multiple members of the mine committee, the Union's district representative, and the Union's

international representative, Michael Phillippi. APP0511. From December 2015 through May 2016, Mohan received approximately 50 information requests from the Union, with the bulk coming from Phillippi. APP0512; APP0735. This was not Mohan's only responsibility, however. As Human Resources Supervisor, she was also responsible for hiring, assisting with disciplinary action, checking the mine's attendance program, maintaining personnel, disciplinary, and attendance files, and other general employee relations issues. APP0506-APP0507.

On or about March 31, 2016, Phillippi emailed an information request to Mohan about contracting out work. APP0687-APP0688. Specifically, Phillippi asked Mohan to provide him with:

> 1. Copies of all invoices, bills, and any other document submitted by ANY contractor describing the type and duration of any work performed by a contractor at any time between July, 2015 and present; [and]
>
> 2. Copies of all Bid Forms, Estimates, Offers or any other document describing the nature, extent, type and duration of the work to be done submitted by a contractor for work to be done at the mine at any time between July, 2015 and present[.]

APP0688.[5]

Phillippi stated that the Union needed such information "[i]n order to monitor compliance with the Contract and to determine whether or not to file or pursue any grievances," but provided no further information to enable Petitioners to understand

[5] There are three additional requests set forth in APP0688; however, the Union did not allege that Petitioners' responses to these requests violated the Act.

why such a broad array of information was necessary. *Id.* The information request was not only extensive, but Phillippi also demanded that Mohan provide the requested information the next day. APP0687. Mohan responded to Phillippi's request, indicating that the requests were non-specific and burdensome or that the company did not maintain the information requested. APP0691. Mohan reiterated her objection to the information request on April 5, 2016, stating that the request was "not specific to any grievance or arbitration" and that it was "burdensome and lacks specifics." APP0689. Additionally, Mohan asked Phillippi to provide a specific date, grievant, contractor, project, or similar information that would allow her to search for and provide responsive information. *Id.* Phillippi refused to do so, however, and again demanded "prompt and complete responses to our requests." APP0690.

Although the relevance of the requested information was not presumed, Judge Goldman found it should have been apparent to Petitioners, especially given Phillippi's "explanation" that such information was necessary to "monitor and ensure compliance with our contract." APP0144. Judge Goldman also determined that Mohan's responses to Phillippi's demands were insufficient and rejected Petitioners' argument that the Union sought such information in bad faith. The Board affirmed each of Judge Goldman's determinations.

Information Requests Concerning Absenteeism Plans. On or about December 5, 2013, Ohio Valley Resources, which owns Murray American Energy, Inc., acquired the Mon County Mine from Consol Energy, Inc. APP0666. While the Mon County Mine was owned by Consol Energy, Inc., union employee attendance was addressed using the "Bradford" plan or factor. APP0528; APP0683. On or about March 1, 2014, employees were notified that absences would no longer be calculated based on the "Bradford" factor, but would be calculated in a different manner. APP0683. This new method of calculation and administration was referred to as the "C&E" plan. On December 22, 2015, Phillippi sent an information request to Mohan and Tim Baum, the Assistant to the Manager of Human Resources and Employee Relations, among others, seeking information about the Mon County Mine's chronic and excessive absenteeism disciplinary program. APP0675-APP0676. Specifically, Phillippi requested:

1. A list of all hourly employees on the Bradford plan Jan 2014;
2. A list of all hourly employees currently on the new C&E plan; and
3. A copy of all C&E plan policies and changes since the Murray acquisition.

Id.

As to Phillippi's first request, Mohan testified that she played no role in the administration of the "Bradford" plan and that she understood, based on an email from her original supervisor, that the plan had not been administered at the Mon

County Mine since before the acquisition. APP0528-APP0529; APP0544. After receiving the information request, however, Mohan reviewed the shared files for updated documentation regarding hourly employees on the "Bradford" plan and saw nothing updated since October 2013. APP0529; APP0543. The lack of updated documentation supported Mohan's belief that the plan had not been administered at the mine since before the acquisition, and there were no employees on the "Bradford" plan as of January 2014.

Regarding Phillippi's second request, Mohan testified that employees received a written letter signed by a member of management when they were placed on the C&E plan. APP0529. The letter outlined the employee's absentee percentage and the number of "occurrences" they received in the applicable 12-month period. APP0530. The Union also received a copy of the letter provided to the employee, and was notified when an hourly employee was placed on the C&E plan. APP0530. Employees were also notified of any changes in their status regarding the plan, including if they had been removed. APP0530. The Union likewise received copies of all such status changes. APP0530. Baum also testified that the Union received such information. APP0416.

Finally, as to Phillippi's third request, Baum testified that the Union was again provided the requested information. APP0416-APP0417.

At the hearing before Judge Goldman, the parties stipulated that the information responsive to Phillippi's first request was provided to the Union on January 23, 2017. APP0668. Judge Goldman thereafter determined this was an "unreasonable delay" in violation of the Act, and rejected Petitioners' assertion it did not have to provide information in response to the second and third requests because the Union already had such information. The Board affirmed.

The Alleged Unilateral Change. This allegation arose from the decision to hold Step 3 grievance meetings exclusively at Marion County Mine's Metz Portal. APP0014-APP0015. Under the parties' collective bargaining agreement, there were four steps in the grievance process. APP0547-APP0557; APP0627-APP0631. The step at issue in this case—Step 3—involved a meeting with executive mine management and, typically, corporate human resources personnel, and a district representative from the Union. APP0385. If a resolution was not reached at Step 3, the grievance was referred to arbitration. The parties' collective bargaining agreement was silent on where a Step 3, or any other grievance-related meeting, is held. APP0547-APP0557; APP0627-APP0631. At the Marion County Mine, the mine superintendent generally attended the Step 3 meetings, which typically lasted a full day as multiple grievances were scheduled for discussion. APP0479; APP0409-APP410. While employees had a right to attend Step 3 meetings,

attendance was not mandatory. APP0410; APP0480. Employees were not paid for their time and not all employees elected to participate. APP0410; APP0480.

In or around October 2016, the Marion County Mine decided to hold Step 3 grievance meetings at the Metz Portal rather than at multiple locations as it was extraordinarily burdensome for the mine's general manager to travel to the other portals for the Step 3 meetings. APP0411; APP0413. In response to a request by the Union to schedule multiple Step 3 grievance meetings at each of the mine's portals, mine management asked to hold all such meetings at the Metz Portal. APP0692.

The Marion County Mine consists of four employee reporting locations: (1) the Metz Portal; (2) the Miracle Run Portal; (3) the Prep Plant; and (4) the Sugar Run Portal. APP0692. Approximately 75% of the Marion County Mine's employees report to the Metz Portal, which is considered the mine's "hub." APP0407; APP0478. Besides housing the majority of the mine's employees, the Metz Portal houses critical management and administrative offices. APP0407. It takes approximately 15 to 20 minutes to drive from the other reporting locations to the Metz Portal. APP0178.

The parties stipulated that from January 1, 2014 to October 3, 2016, Step 3 grievance meetings at the Marion County Mine had been held at the mine portal at which the grievant worked with limited exceptions including, but not limited to,

instances in which the grievant did not wish to participate in the Step 3 meeting or those in which the grievant was an officer involved in Step 3 processing away from his home portal. APP0667.

Judge Goldman and the Board determined that the decision to hold Step 3 grievance meetings at the Metz Portal constituted a unilateral change in violation of Sections 8(a)(5) and 8(a)(1) of the Act.

II. Procedural History

Within an eight-month period, the Union filed 11 separate unfair labor practice charges with the Board. These charges were ultimately consolidated for administrative purposes, and the consolidated cases were heard by Judge Goldman on January 30-31, February 1, and March 1, 2017. The parties filed post-trial briefs to support their respective positions by April 5, 2017. On May 8, 2017, Judge Goldman issued his decision and order finding that Petitioners committed various violations of the Act, as outlined above. APP0038-APP0104. On June 5, 2017, Petitioners filed exceptions to Judge Goldman's decision and order. APP0105-APP0115. On May 7, 2018, the Board issued its Decision and Order affirming Judge Goldman's rulings, findings, and conclusions, and adopting the recommended Order, as modified therein. APP0116-APP0151. The Board's Decision and Order is recorded at 366 NLRB No. 80. Petitioners filed their Petition for Review of the

Board's Decision and Order on May 31, 2018, and the Union filed its Cross-Application for Enforcement on June 29, 2018.

SUMMARY OF ARGUMENT

Petitioners did not engage in the violations of Section 8(a)(1) of the Act as alleged. The various findings regarding threats of discipline and unlawful directives and surveillance are all either incompatible with the Board's own precedent or unsupported by substantial evidence.

Likewise, the record and proper application of the law do not support the finding that Petitioners issued discipline in violation of Sections 8(a)(3) and 8(a)(4) of the Act. To the contrary, such finding results from an incomplete analysis of the evidence and application of the *Wright Line* factors.

The Board's affirmation of Judge Goldman's findings regarding the alleged violations of Section 8(a)(5) was also in error. Petitioners generally have responded to the Union's voluminous information requests when such requests sought relevant information that was available to Petitioners. Here, the Union did not seek presumptively relevant information and failed to otherwise show why such information was relevant. Moreover, certain of the information requested was not available to Petitioners or was already in the possession of the Union. In these circumstances, Petitioners' inability to provide the requested information was reasonable and did not constitute a violation of the Act.

Finally, the finding that Petitioners' decision to change the location of Step 3 grievance meetings was a material unilateral change is not supported by Board precedent and should therefore be overturned.

STANDING

Petitioners, as employers engaged in interstate commerce, were subject to the Board's jurisdiction to determine whether they engaged in unfair labor practices. The Board concluded that Petitioners violated the Act and directed it to "cease and desist" from engaging in certain activities deemed to be violations of the Act and take affirmative actions to effectuate the policies of the Act. Petitioners are therefore aggrieved parties within the meaning of Section 10(f) of the Act, 29 U.S.C. § 160(f), and have standing to seek review of the Board's final order in this Court.

ARGUMENT

I. Standard

It is well understood that a court may set aside a decision of the Board "when it departs from established precedent without reasoned justification, or when the Board's factual determinations are not supported by substantial evidence." *King Soopers, Inc. v. Nat'l Labor Relations Bd.*, 859 F.3d 23, 29 (D.C. Cir. 2017) (citing *Titanium Metals Corp. v. NLRB*, 392 F.3d 439, 446 (D.C. Cir. 2004)); *see also Tramont Mfg., LLC v. NLRB*, 890 F.3d 1114, 1119 (D.C. Cir. 2018) (a court will set aside the Board's order only if the Board acted arbitrarily or otherwise erred in

applying established law to the facts, or if its findings are not supported by substantial evidence). "Substantial evidence 'means such relevant evidence as a reasonable mind might accept as adequate to support a conclusion.'" *King Soopers, Inc.*, 859 F.3d at 29-30 (citing *Micro Pac. Dev. Inc. v. NLRB*, 178 F.3d 1325, 1329 (D.C. Cir. 1999)). Importantly, the Board is "not free to prescribe what inferences from the evidence it will accept and reject, but must draw all inferences that the evidence presented fairly demands." *Allentown Mack Sales & Serv., Inc. v. NLRB*, 522 U.S. 359, 378 (1998). "'Substantial evidence' review exists precisely to ensure that the Board achieves minimal compliance with this obligation, which is the foundation of all honest and legitimate adjudication." *Id.* at 378-79. A reviewing court must carefully examine both the Board's findings and its reasoning. *Titanium Metals Corp.*, 392 F.3d at 446.

II. The Board's Determinations That Petitioners Violated Section 8(a)(1) of the Act Are Not Supported by Substantial Evidence and/or Are Contrary to Board Precedent

A. The Board's Determination that Petitioners Threatened Peek is Based on Unwarranted Credibility Determinations and is Therefore Not Supported by Substantial Evidence

Judge Goldman credited Peeks' version of his interaction with Martin and determined that Petitioners violated Section 8(a)(1) of the Act. Specifically, Judge Goldman stated that he credited Peeks' account because his "demeanor struck [him] as an honest and straightforward account [and] [h]e did not appear motivated to lie."

APP0123. However, he provided few details to support this assessment. Likewise, he discredited Martin simply because he was "overconfident" and "fast-talking," but it is unclear from Judge Goldman's decision why such traits indicate dishonesty or what in the record otherwise establishes that Martin was dishonest. *Id.* The explanations provided for his credibility determinations lack thoughtful and reasoned analysis and suggest bias. They also differ greatly from those upheld by the Court in other decisions. *See, e.g.*, *King Soopers, Inc.*, 859 F.3d at 33 (declining to disturb Board's adoption of ALJ's credibility findings where she "relied on important contextual factors, including demeanor, her knowledge of industrial practices, the record, and the presence of consistencies or inconsistencies in a witness' story); *Ozburn-Hessey Logistics, LLC v. NLRB*, 833 F.3d 210, 220–21 (D.C. Cir. 2016) (declining to disturb Board's adoption of credibility findings where ALJ discredited witness testimony because one witness "was a confusing, hostile, and argumentative witness" whose testimony was "disjointed" and another was "a biased witness, who previously made an unsubstantiated claim that Smith threatened her with a knife, and who also conceded that she dislikes Smith" as such findings rested on substantial record support).

Here, Judge Goldman's credibility determinations are vague and do not appear to be supported by the evidence of record. His determinations and the findings based thereon should be reversed.

B. The Board's Determination that Petitioners Directed Employees Not to File Safety Complaints with MSHA is Not Supported by Substantial Evidence

Judge Goldman found that Jones "made clear that employees should report safety complaints not to MSHA, but rather, to the employer" and suggested that if employees kept making safety reports to MSHA, "they are going to shut this place down." APP0127. These findings are drawn from unwarranted credibility determinations that ignore material evidence of record, and are therefore not supported by substantial evidence.

Three witnesses testified regarding the December 2015 safety meeting. Hayes was the only witness who testified that Jones made such remarks. APP0305; APP0311; APP0473; APP0468. Although Hayes' testimony was not corroborated and was, in fact, contradicted, Judge Goldman credited Hayes' testimony "not only because of Hayes' demeanor," which he did not describe, but also "because of its plausibility." APP0127. This credibility determination and the resultant factual findings ignore that portion of Hayes' testimony in which he stated that an MSHA investigator was present at the meeting. APP0304. It is not plausible that Jones—in front of an MSHA representative charged with enforcement of the Federal Mine Safety and Health Act (the "Mine Act")—issued threats or directives. Doing so would lead inexorably to an MSHA citation, as such conduct would likely violate the Mine Act. *See* 30 U.S.C. § 815(c). Judge Goldman inexplicably disregarded this material testimony that challenged the plausibility of Hayes' account.

Accordingly, his finding that Jones issued the unlawful directive is not supported by substantial evidence. *See Tenneco Auto., Inc. v. NLRB*, 716 F.3d 640, 649 (D.C. Cir. 2013) (citing *Universal Camera Corp.*, 340 U.S. 474 (1951)) (concluding Board's determination was not supported by substantial evidence insofar as it disregarded material evidence that belied any causal relationship between the company's unfair labor practices and the employees' petition for decertification as "[t]he substantiality of evidence must take into account whatever in the record fairly detracts from its weight.")

Further, in finding that Jones issued such a directive and/or threat, Judge Goldman improperly discredited Simpson's account. Judge Goldman acknowledged that Simpson "overheard Jones' comments from the adjacent hallway[.]" APP0127. However, he then found that Simpson's account did not warrant crediting over Hayes or Ward because Simpson was "not in the meeting," and was "otherwise occupied with contractor employees" and "unlikely to have heard everything said." *Id.* These findings are rooted entirely in speculation and are not supported by the record. Simpson testified that the hallway was merely an "attachment" of the room in which the safety meeting was held, and that while he was intermittently speaking with other employees, "whenever the head honcho talks, you usually pay attention to what's going on." APP0470. Petitioners are unaware of any requirement that credible testimony can come only from the witnesses in the closest proximity to, and

interested only in, the event at issue. *See Ozburn-Hessey Logistics, LLC*, 833 F.3d at 220–21 (declining to disturb Board's adoption of credibility finding based on consistent accounts of other "credible witnesses"—one of whom "observed" the altercation from "about thirty feet away" and stated she did not hear the epithet, and another who testified he would have heard the racial slur if actually said because he was "focused enough on what was going on").

The Board's affirmation of Judge Goldman's credibility determinations, and his findings based thereon, should be overturned as such determinations ignored material testimony and were not otherwise supported by the substantial evidence of record.

C. The Board's Determination that Petitioners Unlawfully Threatened Hayes was Arbitrary Because it Misapplied the Atlantic Steel Factors

When an employee engages in indefensible or abusive misconduct during otherwise protected activity, the employee forfeits the Act's protections. *Daimlerchrysler Corp.*, 344 NLRB 1324, 1329 (2005). Whether the Act's protection is lost depends on balancing four factors: (1) the place of discussion between the employee and the employer; (2) the subject of the discussion; (3) the nature of the employee's outburst; and (4) whether the outburst was provoked by an employer's unfair labor practice. *Id.* (citing *Atlantic Steel Co.*, 245 NLRB 814 (1979)).

The Board affirmed Judge Goldman's determination that, under the *Atlantic Steel* factors, Hayes "most certainly did not lose the protections of the Act based on his actions at the December 16 safety meeting." APP0129. However, Judge Goldman's analysis of whether Hayes forfeited the Act's protections was inattentive and, if conducted properly, would not have led to such an assured conclusion. Indeed, Judge Goldman's analysis of the *Atlantic Steel* factors is set forth in a footnote, which reflects his limited and neglectful treatment of the issue. In his brief analysis, Judge Goldman misapplied at least half of the *Atlantic Steel* factors and the Board's affirmation that Petitioners violated Section 8(a)(1) on this basis should be reversed.

Judge Goldman found the first factor—the place of the discussion—supported protection. This finding was wrong. It contradicts Board precedent insofar as Hayes' verbal assault on management occurred in a meeting in which supervisory and non-supervisory personnel were present, which would tend to affect workplace discipline by undermining the authority of the supervisor, who was responsible for leading that meeting and future safety meetings. *See, e.g., Daimlerchysler Corp.*, 334 NLRB at 1329 (citing *Aluminium Co. of America*, 338 NLRB 20, 21 (2004) (outburst in employee break room overhead by supervisor and two employees); *Piper Realty Co.*, 313 NLRB 1289, 1290 (1994) (outburst in supervisor's office with door open overheard by two clerical employees).

While agreeing that Hayes' conduct was "out of line," Judge Goldman summarily determined that the third factor also favored protection because Hayes' conduct involved no profanity and no threats. APP0129 This Court has rejected the suggestion that employees engaging in protected activity "could not be dismissed unless they were involved in flagrant, violent, or extreme behavior" as Section 10(c) of the Act permits discharge for "cause" short of that. *Felix Indus., Inc. v. NLRB*, 251 F.3d 1051, 1055 (D.C. Cir. 2001) (citing *Aroostook Cty v. NLRB*, 81 F.3d 209, 215 n. 5 (1996); *see also Republic Aviation Corp. v. NLRB*, 324 U.S. 793, 803 n. 10 (1945) ("The Act, of course, does not prevent an employer from making and enforcing reasonable rules covering the conduct of employees on company time"). Under this Circuit's precedent, if an employee is disciplined for denouncing a supervisor in obscene, personally-denigrating, or insubordinate terms, then the nature of his outburst properly counts against according him the protection of the Act. *Felix Indust., Inc.*, 251 F.3d at 1055. Properly applied here, Hayes' conduct should count against according him the protection of the Act. Hayes was threatened with discipline after he became loud and belligerent while addressing a supervisor at a safety meeting and stormed out of the meeting before it was concluded. While Hayes' conduct may not have been flagrant, violent, or extreme, that does not mean that the nature of his conduct supports protection.

Finally, Judge Goldman incorrectly concluded that the fourth factor—whether the outburst was provoked by an employer's unfair labor practice—also supported protection. As outlined above, Petitioners vigorously dispute Judge Goldman's determination that Jones directed employees not to bring safety complaints to MSHA in violation of Section 8(a)(1).

Judge Goldman's determination that Petitioners violated Section 8(a)(1) by threatening Hayes with discipline for his belligerent and insubordinate conduct was based on a misapplication of the *Atlantic Steel* factors, and the Board erred in affirming Judge Goldman's hasty analysis and the conclusion derived therefrom.

D. The Board's Determination that Devine Engaged in Unlawful Surveillance is Not Supported by Substantial Evidence and is Contrary to Board Precedent

Courts have held that an employer's conduct violates Section 8(a)(1) of the Act if it creates the impression among employees they are subject to surveillance. *See Parsippany Hotel Mgmt. Co. v. NLRB*, 99 F.3d 413, 420 (D.C. Cir. 1996). This prohibition on surveillance does not, however, prevent employers from observing public union activity if the employer does not engage in conduct so "out of the ordinary" that it creates the impression of surveillance. *Id.* (citing *NLRB v. Southern Maryland Hosp. Ctr.*, 916 F.2d 932, 938 (4th Cir. 1990)). The test for determining whether an employer engages in unlawful surveillance is objective and involves the determination of whether the employer's conduct, under the circumstances, was such as would interfere with, restrain or coerce employees in exercising their rights

guaranteed under Section 7 of the Act. *Holsum De Puerto Rico, Inc.*, 344 NLRB 694, 708–09 (2005) (citing *Martech Med. Prods.*, 331 NLRB 487, 500 (2000); *Parsippany Hotel Mgmt. Co.*, 319 NLRB 114, 125 (1995)). In determining whether an employer's observation of employees crosses the line into unlawful surveillance, the Board must look to "the duration of the observation, the employer's distance from its employees while observing them, and whether the employer engaged in other coercive behavior during its observation." *Bellagio, LLC v. NLRB*, 854 F.3d 703, 711-12 (D.C. Cir. 2017) (quoting *Aladdin Gaming, LLC*, 345 NLRB 585, 586 (2005), *enf'd sub nom. Local Joint Exec. Bd. of Las Vegas v. NLRB*, 515 F.3d 942 (9th Cir. 2008)).

The Board's affirmation of Judge Goldman's determination that Petitioners engaged in unlawful surveillance should be overturned as it is not supported by substantial evidence or consistent with Board precedent.

1. The Determination is Not Supported by Substantial Evidence

The Board affirmed Judge Goldman's factual findings underpinning the unlawful surveillance determination. Certain of these factual findings, however, lack substantial evidentiary support.

While Petitioners do not dispute Judge Goldman's findings that after Devine's own meeting at the MSHA district office ended, his exit route took him by the double doors of the large conference room in which Hayes was located, Judge Goldman's

related findings—that Devine "paused there, pressed close, and peered into the room"—are not supported by substantial evidence on the record considered as a whole. APP0130 Indeed, the only witness who testified that Devine "pressed close" to the windows of the conference room was Michael Payton, who claimed—incredibly—that Devine "had his face against the window[.]" APP0276. Yet, another witness called by the General Counsel, Rick Rinehart, testified that he saw Devine "approximately five feet from the door" and specifically denied seeing Devine's face "pressed against the window." APP0290; APP0299. Likewise, Payton was the only witness who indicated that Devine purposefully "peered" into the room. According to Payton's dramatic retelling, Devine was "moving his head up and down and kind of looking side to side . . . to see who was in the room." APP0276. Yet Rinehart testified that Devine was "[j]ust kind of looking in the door, looking in the window" as he was passing down the hallway. APP0290; APP0299. Hayes, the very employee allegedly being surveilled, did not see Devine. APP0310. And Devine acknowledged that he had passed by the conference room to exit the building, but denied that he stuck in head in the window. APP0501; APP0502.

The exaggerated testimony of a single witness does not constitute "substantial evidentiary support" for Judge Goldman's factual findings that Devine "pressed close" and purposely "peered" into the conference room, especially where it is contradicted by other testimony. Judge Goldman and the Board, through its

affirmation of his findings, failed to draw the inferences demanded by the ***entirety of the evidence*** presented. Rather, they accepted implausible and inconsistent testimonial evidence while ignoring the evidence presented by Petitioners and the reasonable inferences to be drawn therefrom. Relying solely on the Board's evidence, Judge Goldman concluded that Devine "pressed close" and "peered" into the conference room, and "stopped to investigate and see what else he could learn about the meeting, its attendees, and purpose, by standing in the window to the meeting room and purposely peering into it." APP0130-APP0131. Judge Goldman summarily dismissed Devine's testimony, characterizing his denials of the alleged conduct as "mostly assertions of not remembering it." APP0130. While Devine admittedly did not remember approaching the window to the conference room when he exited MSHA's offices (because it did not happen), it was improper for Judge Goldman to reject the inferences to be drawn from his testimony ***as a whole*** and conclude that Devine was lying or that his testimony was otherwise not credible. In doing so, Judge Goldman rejected the inference demanded by the evidence Petitioners presented through the remainder of Devine's testimony—that Devine did not recall the details of leaving the MSHA district office on February 17, 2016 because it was a routine event during which nothing out of the ordinary, including unlawful surveillance, occurred. *See e.g.*, APP0493-APP0494; APP0496-APP0497; APP0502 (testimony indicating how routine Devine's interactions with MSHA

were, including his acknowledgment he interacted with MSHA "almost daily," his knowledge about the sign-in process, set-up of the waiting area, and layout of the conference rooms, and how he would often be delayed in departing from the MSHA offices).

2. The Determination is Contrary to Board Precedent

Even if Devine "pressed close" and "peered" into the conference room, such conduct does not constitute unlawful surveillance under Board precedent. The decisions cited by Judge Goldman to support his determination are easily distinguishable. In *Astro Shapes, Inc.*, 317 NLRB 1132 (1995), the Board affirmed a finding of unlawful surveillance where a supervisor intentionally drove to and parked at a tavern after hearing that employees planned to meet there after work to discuss the benefits of union membership. *Id.* at 1133. There, the supervisor admitted that he went to the tavern because he was "extremely curious" about how many employees would show up. *Id.* Here, Devine was present at the MSHA district office for a reason wholly unrelated to Hayes' investigatory meeting, and testified he was not there to "spy" on Hayes. APP0495; APP0501; APP0503. The other decision cited by Judge Goldman, *Dadco Fashions, Inc.*, 243 NLRB 1193 (1979), is likewise inapposite. There, the Board held that a supervisor engaged in unlawful surveillance where she admitted to driving by a meeting four times "because she was curious and wanted to see what was going on." *Id.* at 1198-99.

Of the decisions cited by Judge Goldman, the one that is most analogous to the situation presented here is one he erroneously cited as distinguishable—*Valmont Indust., Inc.*, 328 NLRB 309 (1999). In *Valmont*, the Board affirmed an ALJ's recommendation that an allegation of unlawful surveillance be dismissed where a supervisor was, by happenstance, present at a motel during a union meeting. Specifically, the supervisor's stepdaughter, who worked as a front desk clerk, asked him to stop by the motel and get her credit card so he could pick up a phone she ordered from Radio Shack. The record evidence established that after leaving the motel, the supervisor proceeded to Radio Shack and completed the requested transaction. According to the Board, "[t]he mere presence of a supervisor or management official at a location where union activity is taking place does not establish unlawful surveillance." *Id.* at 318. Instead, "where purely fortuitous circumstances bring such parties together there is no dogmatic legal principle by which the employer would be declared to have violated the Act." *Id.* (citing *Gossen Co.*, 254 NLRB 339, 353 (1981)). As in *Valmont*, "purely fortuitous circumstances"—which were undisputed and established by record evidence—brought Devine to the MSHA district office on the same day and at the same time as Hayes' meeting. APP0733. Even if human nature led him to happen to look inside the window of the conference room where the meeting occurred as he passed by, such conduct is distinct from the overt intentional conduct of the supervisors in *Astro*

and *Dadco*, which was motivated by their admitted curiosity. *See also Bellagio, LLC*, 854 F.3d at 712 (determining no unlawful surveillance occurred where supervisor only briefly observed employee in location where supervisor had every right to be because such actions were "analogous" to situations in which the Board has found employers did not engage in unlawful surveillance).

Devine was asked by MSHA to go to a specific place at a specific time. There happened to be a mine employee at the same place at the same time. While Devine does not even remember seeing Hayes, the fact that he may have seen him by coincidence does not constitute an unfair labor practice. The Board's determination that Devine engaged in unlawful surveillance is contrary to precedent and should be reversed.

E. The Board's Determination that Phillips Threatened Preston is Not Supported by Substantial Evidence

Phillips' alleged "smart-aleck" remark to Preston cannot support an unfair labor practice charge. As an initial matter, Preston is the only witness who testified that he specifically requested union representation and that Phillips made the alleged "threat." Phillips and Kirk both denied that Preston specifically asked for a union representative and that Phillips made any such comment. APP0428; APP0433. Notwithstanding their denials, Judge Goldman found that Preston's "desire for union representation and the perceived threat of discipline was central to the encounter."

APP0136. This finding is simply not supported by the record and relies instead on flawed credibility assessments.

Judge Goldman erroneously credited Preston's account and found Phillips' and Kirk's accounts implausible. When the testimony is impartially evaluated, however, it becomes clear that it is Preston's account that is implausible. Preston testified that before he even entered Phillips' office he requested union representation. APP0332. Preston provided no basis for his belief that the meeting was reasonably likely to lead to discipline and conceded that the first thing Phillips said to him was "this ain't a write up, and he just had a few questions." APP0332. Preston then claimed that Phillips—after assuring Preston he didn't intend to issue discipline—threatened Preston with discipline. APP0302-APP0303. This contradiction renders Preston's account implausible. His story became even more unlikely, however, when he testified that Phillips launched into "direct orders" in the form of questions. APP0302-APP0303.

More plausible is Phillips' and Kirk's accounts, which were that Phillips tried to ask Preston a question in a normal conversation, and had to repeat his question only after Preston refused to respond. APP0426; APP0427; APP0432; APP0433. While Judge Goldman found this version of the "incident" implausible, in doing so, he again disregarded material evidence in making credibility determinations. For instance, Judge Goldman concluded Phillips' and Kirks' accounts were "particularly

implausible" because Preston likely did not come to the office on his own to ask for a favor. APP0136 Specifically, Judge Goldman found "[t]here is nothing in [Phillips'] account that would suggest that he would think that Preston had come into ask for a favor." *Id.* However, Phillips testified without contradiction that he rarely spoke with Preston unless Preston came to ask him for a favor, and that Preston had previously asked Phillips about getting out on time for military duties or for other personal reasons. APP0430; APP0435. Although an ALJ's credibility determinations are entitled to significant deference, they are not immune to judicial scrutiny. *Sutter E. Bay Hosps. v. NLRB*, 687 F.3d 424, 438 (D.C. Cir. 2012). As outlined above, the credibility determinations made by the ALJ and adopted by the Board are patently unsupportable and should be overturned.

Further, even if Preston's testimony was properly credited, Judge Goldman's determination that Phillips' comment was a "naked threat" to discipline an employee for asserting the right to a union representative which would "reasonably have a tendency to coerce an employee in the exercise of Section 7 rights" is not supported by substantial evidence. APP0136. It is well established that the test of whether an employer's remarks or actions violated Section 8(a)(1)'s prohibition against interference, restraint, or coercion is not whether it succeeds or fails, but, rather, the objective standard of whether it tends to interfere with the free exercise of employee rights under the Act. *Cheney Constr., Inc.*, 344 NLRB 238, 239 (2005) (citing

Fieldcrest Cannon, Inc., 318 NLRB 470, 490 (1995)). Notably, Judge Goldman characterized the comment as a "smart-aleck" threat. APP0136. This very characterization belies his determination that the comment would—objectively—have a tendency to coerce an employee in exercising Section 7 rights. There was no actual evidence presented that this alleged "threat" objectively tended to interfere with the free exercise of employee rights under the Act, and, it is markedly different from those found unlawful in prior Board decisions. *See, e.g., Readyjet, Inc.*, 365 NLRB No. 120 (Aug. 16, 2017) (finding violations where employer warned one employee this was his "last chance because of involvement with union strike" and another employee he would receive "more warnings or a discharge if he continued to support the union"); *Wal-Mart Stores, Inc.*, 364 NLRB No. 118 (Aug. 27, 2016) (finding violation where unrebutted evidentiary record established employer told associates returning strikers would be looking for new jobs). For this additional reason, the Board's affirmation of Judge Goldman's determination should be overturned.

III. The Board's Determinations that Petitioners Violated Sections 8(a)(3) and 8(a)(4) Lack Substantial Evidentiary Support

In determining whether an employer's discipline of an employee constituted an unfair labor practice, the Board applies the *Wright Line* test. *Inova Health Sys. v. NLRB*, 795 F.3d 68, 80 (D.C. Cir. 2015) (citing *Wright Line, a Division of Wright Line, Inc.*, 251 NLRB 1083 (1980)). To make out a *prima facie* case under *Wright*

Line, the General Counsel for the Board must demonstrate that (i) the employee was engaged in an activity protected by 29 U.S.C. § 157, (ii) the employer knew of that protected activity, and (iii) the protected activity was a motivating factor in the employer's decision to take adverse action." *Id.* (citing *Citizens Inv. Services Corp. v. NLRB*, 430 F.3d 1195, 1198 (D.C. Cir. 2005)). Once the General Counsel has made that *prima facie* showing, the burden of persuasion shifts to the employer "to show that it would have taken the same action in the absence of the unlawful motive." *Id.* (citing *Bally's Park Place, Inc. v. NLRB*, 646 F.3d 929, 935 (D.C. Cir. 2011)). If the Board concludes that the employer's purported justifications for adverse action against an employee are pretextual, then the employer fails as a matter of law to carry its burden at the second prong of *Wright Line*. *Ozburn-Hessey Logistics, LLC*, 833 F.3d at 219. As Petitioners have noted throughout this brief, the obligation of the reviewing court is to assess the "whole record," meaning that the court's analysis must consider not only the evidence supporting the Board's decision but also "whatever in the record fairly detracts from its weight." *Tenneco Auto., Inc.*, 716 F.3d at 647 (citing *Universal Camera Corp.*, 340 U.S. at 488).

Here, Judge Goldman found that General Counsel made a *prima facie* showing and that Petitioners' explanation for its decision to suspend Moore on September 19, 2016 was a pretext. APP0134. Specifically, he determined that "Moore's protected activity over his grievance activity led to his June 8 suspension,

which, in turn, was the cause of the August 29 unfair labor practice charge filed over his suspension" satisfying the first *Wright Line* element. *Id.* He also determined that Marshall County Mine, "including Koontz, the manager responsible for Moore's September 19 suspension, knew of the June 8 incident . . . and knew about the unfair labor practice charge filed over the incident," which satisfied the second *Wright Line* element. *Id.* As to the third element, Judge Goldman cited "evidence of antiunion animus—in incidents detailed both above and below in this decision, including evidence of employer antiunion animus directed specifically at Moore" and "unexplained timing." *Id.* Likewise, Judge Goldman found the timing of the discipline, along with "the longtime asserted tolerance of Moore's lateness" provided a pretext for "unlawfully motivated discipline." *Id.* These determinations, which were affirmed by the Board, ignored and misinterpreted critical testimony, and discounted comparator evidence.

Judge Goldman erred in attributing discriminatory animus to Koontz to satisfy the second *Wright Line* element. It was undisputed that Koontz played no role in Moore's earlier suspension or the charge he filed as a result thereof. APP0452-APP0453. Kontz testified that he was on vacation the week Moore was suspended and he had "very little" knowledge about Moore's unfair labor practice charge. APP0453. It does not follow that Koontz—who was not involved in and only generally aware of Moore's protected activity—sought to suspend him because of

it. Koontz's purported discriminatory animus is also belied by the comments Moore admits Koontz made to him during their meeting and by the meeting itself. Specifically, Moore stated that Koontz told him he was "a very talented employee" and that he "didn't want to fire [him]." APP0256. Koontz also told Moore that if he did not care about Moore and making sure that Moore arrived on time, he would not have called him in for a meeting and would have simply fired him. APP0256. This evidence, which Judge Goldman cited but wholly disregarded, should have been considered in any well-reasoned analysis of *Wright Line*.

In finding pretext, Judge Goldman and the Board ignored Moore's admission he knew he needed to be dressed and ready at 4:00 p.m. and his acknowledgement he was not. Undisputed evidence that an employee violated his employer's policies and procedures should, at a minimum, be considered in determining whether an employer's decision to issue discipline was a pretext.

And Judge Goldman incorrectly concluded that there had been a "longtime tolerance" of Moore's lateness. APP0134. This inference ignores testimony and is based on an unwarranted assumption that because Petitioners had not yet issued a written warning, Moore's lateness was not viewed as problematic. Koontz testified he knew that Moore had been counseled before about his arrival times. APP0442. Likewise, Brone—a shift foreman—testified that he tried to counsel Moore on several occasions about his arrival times. APP0245; APP0463. Notwithstanding

the consistent testimonies of two supervisory employees, Judge Goldman credited Moore's testimony in which he, unsurprisingly, denied receiving verbal counseling for being late. APP0257. This credibility determination was in error as was Judge Goldman's inference that Petitioners tolerated Moore's lateness for a long period and only acted on it shortly after he engaged in protected activity, thereby evidencing unlawful motivation.

Judge Goldman also inexplicably discounted evidence of similar discipline issued at the same mine. While he acknowledged that the General Counsel introduced documentary evidence about an employee disciplined for being late for his assigned shift time, he accorded it no weight in his analysis. (20)

Judge Goldman's determination that Petitioners violated Sections 8(a)(3) and 8(a)(4) lacks substantial evidentiary support and the Board's affirmation thereof should be overturned.

IV. The Board's Determinations that Petitioners Violated Section 8(a)(5) are Arbitrary and Capricious

A. The Board Erred in Finding the Information Requests Concerning Contractors were Relevant and that Mohan's Response Thereto was Insufficient

Board law is clear that "[i]nformation about subcontracting agreements, even those relating to bargaining unit employees' terms and conditions of employment, is not presumptively relevant." *Disneyland Park*, 350 NLRB 1256, 1258 (2007). While Judge Goldman correctly noted that the Union had the burden of establishing

the relevancy of such information, his ultimate determination that the Union carried this burden was in error.

1. The Relevance of the Non-Unit Information Requested Was Not Apparent

The Union's March 31, 2016 requests for information concerned non-bargaining unit employees. APP0687-APP0688. The General Counsel, on behalf of the Union, therefore had to present evidence either (1) that the union demonstrated relevance of the non-unit information, or (2) that the relevance of the information should have been apparent under the circumstances. *Disneyland Park*, 350 NLRB at 1258.

Judge Goldman incorrectly determined that the relevance of the non-unit information should have been apparent to Petitioners under the circumstances. To support this determination, he cited Petitioners' acknowledgment that contractors' work had been the source of information requests to which Mohan had regularly responded. APP0144. While Petitioners acknowledged that Mohan had received and responded to information requests about contractors' work, this does not mean the relevance of these specific requests was apparent. Indeed, part of the problem with the March 31, 2016 requests for information was how different they were from previous requests to which Petitioners had responded. *Compare* APP0687 (requesting all "Bid Forms, Estimates, Offers or any other document describing the nature, extent, type and duration of the work to be done submitted by a contractor

for work to be done at the mine at any time between July, 2015 and present") to APP0766 (requesting "[i]nvoices from contractors for all snow removal work from 1/11/16 to present"). In contrast to earlier requests regarding contractor work that sought invoices for specific work performed or a list of contractors on site on a specific date or range of dates, in his March 31 request, Phillippi demanded that Mohan provide copies of bid forms, estimates, and offers of all work to be done at the mine between July 2015 and present, regardless of whether such work was ever performed. If the work was never contracted for and performed, it is hard to understand how information related thereto could relate to the Union's asserted desire to "ensure compliance" with the parties' collective bargaining agreement. Thus, the relevance of such information was not "apparent" to Petitioners.

Judge Goldman also disregarded Petitioners' citation to *NLRB v. Wachter Constr., Inc.*, 23 F.3d 1378 (8th Cir. 1994), which is factually analogous. In *Wachter*, the Eighth Circuit reversed and denied a Board order holding that an employer violated Section 8(a)(5) by failing to furnish requested information to the union. The underlying information request, which was incredibly overbroad, involved information relating to subcontractor agreements and the wages paid by subcontractors to their employees/laborers. The union offered no information regarding why this information was relevant, other than to allege it was necessary to ensure compliance with the collective bargaining agreement. The Eighth Circuit

explained that such a boilerplate response cannot establish relevancy for information going back over a substantial period of time, and found the union's request was not made in good faith. *Id.* at 1385.

Similarly, both at the hearing and in its contemporaneous communications with Petitioners, the Union offered only a conclusory explanation of "ensuring compliance" with the collective bargaining agreement. Judge Goldman and the Board erred in finding the requested information was relevant and that Petitioners violated the Act by failing to provide it.

2. Mohan Provided Sufficient Responses to the Union Regarding the Information Requests

Generally, an employer must either provide the information requested by a union or explain its reasons for noncompliance. *Yp Advert. & Publ'g LLC & Int'l Bhd. of Elec. Workers, Local 1269*, 366 NLRB No. 89 (May 16, 2018) (citing *Columbia Univ.*, 298 NLRB 941, 945 (1990)). If an employer has a legitimate claim that a request for information is unduly burdensome or overbroad, it must articulate those concerns to the union and make a timely offer to cooperate with the union to reach a mutually acceptable accommodation. *Id.* (citing *Mission Foods*, 345 NLRB 788, 789 (2005)). And when an employer does not have the requested information or needs additional time to gather the information, the employer must convey that it does not have the requested information or needs more

time to gather the information, and an unreasonable delay in doing so violates the Act. *Id.* (citing *Postal Service*, 332 NLRB 635, 638-639 (2000)).

Phillippi's March 31, 2016 email set forth two requests, each of which sought a variety of documents and types of information. APP0687-APP0688. Mohan responded to each request. As to the first, she stated the request was "considered burdensome and it lacks any specifics." APP0691. As to the second, she stated that the company did "not maintain records as described." *Id.* Mohan subsequently expanded on her inability to provide responsive information. Specifically, on April 5, 2016, she reiterated that the requests were not specific to any grievance or arbitration, and that they were burdensome and lacked specifics. APP0689. Mohan also asked Phillippi to please narrow his requests for information down to a specific date, grievant, contractor, project, etc. so she could provide responsive information. *Id.* In response, Phillippi simply demanded "prompt and complete responses to our requests." APP0690.

Judge Goldman characterized Mohan's request as a "demand" and found it did not amount to a good faith effort to reach a mutually acceptable accommodation. APP0144. Specifically, Judge Goldman stated that Mohan "essentially dismissed the request, demanding instead that Phillippi provide exactly the information he did not have, and was seeking through the request, as a condition for Mohan to be willing to provide anything." *Id.* These characterizations are wholly contradicted by

Mohan's email and Phillippi's testimony. Mohan issued no demand, but simply requested that Phillippi provide more information to enable her to find and provide responsive documents. APP0689. This was a timely offer to cooperate with the Union and reach a mutually acceptable accommodation. Further, Phillippi's testimony revealed that he had such information and that he ***generally used it to formulate information requests***. When pressed about why the requested information was relevant, he testified that he believed the company was violating the contract based on "a few arbitration rulings, not just one, and if an employee saw a contractor on the property and thought maybe they were performing classified work, then they come to us and we put in a request for information." APP0170. It was nonsensical for Phillippi not to have provided such information, and for Judge Goldman to find Mohan's request that he do so was not a good faith effort to reach a mutually acceptable accommodation. Judge Goldman cited no precedent to support this finding and Petitioners are unaware of any.

Blanket information requests impose a heavy burden on human resources professionals. Mohan, in response to Phillippi's broad request, tried to engage him in an interactive dialogue to focus his request and enable her to provide a meaningful response. In return, Phillippi stonewalled Mohan and demanded immediate and complete production. On these facts, Judge Goldman and the Board concluded that

Petitioners violated the Act. These findings, however, are arbitrary and should be reversed.

B. The Board Erred in Finding Petitioners Violated Section 8(a)(5) in Responding or Failing to Respond to Information Requests Concerning Absence Plans

1. The Delay in Providing Information Concerning the "Bradford" Plan was Not Unreasonable

There is no hard and fast time guideline for determining compliance with a union's lawful information request and the reasonableness of the response is determined by the particular facts and circumstances thereof. *West Penn Power Co.*, 339 NLRB 585, 598 (2003) (citing *Pennco, Inc.*, 212 NLRB 677 (1974)); *see also Yp Advert. & Publ'g LLC*, 366 NLRB No. 89 (May 16, 2018)("[I]t is well established that the duty to furnish requested information cannot be defined in terms of a *per se* rule. What is required is a reasonable good faith effort to respond to the request as promptly as circumstances allow." (citing *Good Life Beverage Co.*, 312 NLRB 1060, 1062 fn. 9 (1993)). In evaluating the promptness of the employer's response, the Board will consider the complexity and extent of information sought, its availability, and the difficulty in retrieving the information. *Id.* (citing *West Penn Power Co., supra*).

The circumstances surrounding the delay in supplying information to the Union's request for "[a] list of all hourly employees on the Bradford plan Jan. 2014" demonstrate that the delay was not unreasonable. Specifically, Mohan testified that

she was never involved in the administration of the Bradford plan and that it was her understanding the plan had not been administered since before the acquisition. APP0528-APP0529; APP0544. Mohan further testified that her initial search for responsive information confirmed this understanding. APP0529. Petitioners' delay in providing responsive information was therefore warranted because it was not clear that such information actually existed and was available.

Judge Goldman rejected this defense as "untrue." APP0142. Incredibly, Judge Goldman found that Mohan's testimony was "not the same as saying that the Bradford plan was not in effect after October 2013," but that is what she said. *Id.* Mohan testified that she understood the Mon County Mine had not used the Bradford plan since the time of the acquisition, and had instead been tracking absences under the standard absence control program in the parties' collective bargaining agreement. APP0544. Mohan also testified that despite her belief the plan was no longer being administered, she searched the shared files for responsive information, and found that the file had not been updated since the acquisition. APP0529; APP0543. Judge Goldman disregarded Mohan's testimony on these points, however, and found, based on the "compelling implication" of a memorandum issued by the mine that the Bradford plan remained in effect from the acquisition until March 1, 2014. APP0142; APP0683. Judge Goldman's finding is arbitrary,

especially given the fact that one of Mohan's responsibilities was checking the attendance program and maintaining attendance files. APP0506-APP0507.

Under the circumstances, the delay in providing responsive information to the Union regarding an absence plan that Petitioners had no reason to believe was still being utilized was not unreasonable.

2. The Other Information Requested by the Union Had Already Been Provided

Petitioners do not dispute the relevancy of the information sought regarding the C&E Plan. However, a finding of relevance does not ensure that a union will receive the desired information in the precise form it requested. *See Oil, Chem. & Atomic Workers Local Union No. 6-418, AFL-CIO v. NLRB*, 711 F.2d 348, 360 (D.C. Cir. 1983) (recognizing that circumstances sometime warrant a refusal to disclose or imposing conditions upon the production of requested information).

Mohan testified, without contradiction, that the Union received copies of the letters regarding placement of employees on the C&E plan, and letters regarding any status changes. AP0530. The Union received this information either in-person or through an "established system" in which Mohan placed the information in a "grab box." *Id.* The Union had the information it requested in its second request—the names of all hourly employees on the C&E plan. While it may have preferred that information in a "list," it was unnecessary for it to receive the information in such form. And while Mohan had a spreadsheet that contained the names of employees

on the C&E plan, it was a part of a larger human resources report, and the Union did not request and otherwise could not access that additional information. Likewise, the undisputed record evidence established that the Union had copies of all C&E plan policies and changes. APP0416-APP0417.

The decisions Judge Goldman cited to support his outright rejection of Petitioners' position are distinguishable. For instance, in *King Soopers, Inc.*, 344 NLRB 842, the Board held an employer had to provide a copy of an agreement the union should have been able to locate in its records where the agreement had been signed 14 years before, and was not incorporated into the parties' most recent collective bargaining agreement. "[I]n those circumstances," the Board concluded the employer was obligated under Section 8(a)(5) of the Act to provide the agreement to the union in response to its requests. There are no such circumstances present here.

Petitioners had no obligation respond to these information requests and the Board erred in affirming Judge Goldman's decision that Petitioners' failure to do so violated the Act.

C. *The Board Erred in Determining Petitioners Violated Section 8(a)(5) by Making a Material Unilateral Change*

A unilateral change regarding a mandatory subject of bargaining violates Section 8(a)(5) and (1) of the Act only if the change is a material, substantial, and significant one. *Berkshire Nursing Home, LLC*, 345 NLRB 220 (2005) (citing

Crittendon Hosp., 342 NLRB 686, 686 (2004)). "In determining whether the unilateral change was material, substantial, and significant, the natural context must be considered." *Oaktree Capital Mgmt., LLC & Tbr Prop., LLC*, 355 NLRB 1272, 1276 (2010) (citing *Xidex Corp.*, 297 NLRB 110, 111 (1989), *enfd.* 924 F.2d 245 (D.C. Cir. 1991)). When an employer takes action "as part of its concerted strategy to weaken and discredit the union in the eyes of the employees" it is proper to look at the other elements of that strategy to determine whether the issue is material and substantial. *Id.* (citing *Xidex Corp. v. NLRB*, 924 F.2d 245, 253 (D.C. Cir. 1991), *rehearing and rehearing en banc denied*).

Judge Goldman found, and the Board affirmed, that Petitioners violated Sections 8(a)(5) and 8(a)(1) of the Act when it decided to hold Step 3 meetings at the Metz Portal rather than at the portal where the grievant worked. APP0148. Although Judge Goldman acknowledged that the number of employees directly affected by the change was likely few, he nonetheless determined that "[f]or those individual employees affected by this unilateral change, there can be no doubt, in my view, of the materiality of the change." *Id.* In making this determination, Judge Goldman mischaracterized and summarily rejected Petitioners' argument that such change was *de minimis* rather than material. Petitioners' position, however, follows Board precedent and Judge Goldman's failure to consider such precedent was in error.

While Petitioners argued, in part, that the change in location would only affect a small universe of employees, the thrust of their argument, which Judge Goldman failed to address, was that the change was not material, substantial, and significant insofar as it would result in only a 15 to 20 minute drive. As such, it was akin to those changes the Board has found to be somewhat inconvenient but ultimately *de minimis*. *See Success Village Apartments, Inc.*, 348 NLRB 579 (2006) (finding change to employer parking policy that resulted in employees being forced to walk approximately 200 additional yards farther from their vehicles to the main building did not rise to the level of a material, substantial, and significant change); *Berkshire Nursing Home, LLC*, 345 NLRB 220 (2005) (finding change in employer parking policy could not be properly characterized as "material, substantial, and significant" where it resulted in the difference of a few minutes in walk time which may have been a "relatively minor inconvenience to the employees, [but was] not a statutorily cognizable change in their terms and conditions of employment"). There is no evidence demonstrating that the change in location of the Step 3 meetings constituted or otherwise involved a change to wages, benefits, bases for discipline, schedules, or other traditional terms of employment. There is no evidence that the decision was made as a part of a concerted strategy to weaken and discredit the Union. The undisputed record evidence demonstrates the sole basis for the decision was the

extraordinary burden it placed on management employees who needed to attend. APP0411; APP0483-APP0485.

Petitioners' decision to change the location of Step 3 meetings was not material, substantial, and significant, and Judge Goldman's determination to the contrary, and the Board's affirmation thereof, were in error.

CONCLUSION

Petitioners request that the Court grant their petition for review, and vacate those portions of the Board's May 7, 2018 Decision and Order discussed herein.

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CERTIFICATE OF COMPLIANCE WITH TYPE-VOLUME LIMIT, TYPEFACE REQUIREMENTS, AND TYPE-STYLE REQUIREMENTS

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UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

MURRAY AMERICAN ENERGY, INC. and THE HARRISON COUNTY COAL COMPANY, a single employer, MURRAYAMERICAN ENERGY, INC. and THE MARION COUNTY COAL COMPANY, a single employer, MURRAY AMERICAN ENERGY, INC. and THE MONONGALIA COUNTY COAL COMPANY, a single employer, MURRAY AMERICAN ENERGY, INC. and THE MARSHALL COUNTY COAL COMPANY, a single employer,	)	Docket No. 18-1151
Petitioners,	)	
v.	)	
NATIONAL LABOR RELATIONS BOARD,	)	
Respondent.	)	

CERTIFICATE OF SERVICE

The undersigned certifies that a true and accurate copy of the foregoing *Brief of Petitioners* was electronically filed on this 4th day of September 2018 and was served through the Court's e-filing system on this counsel of record:

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